ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TRINIDAD "TRINI" GARZA and PEDRO "PETE" VACA,	§	
Plaintiffs,	§	
v.	§	**Civil Action No. 3-01CV0602-H**
DALLAS INDEPENDENT SCHOOL DISTRICT, the BOARD OF EDUCATION OF THE DALLAS INDEPENDENT SCHOOL DISTRICT, and KEN ZORNES, ROXAN STAFF, LOIS PARROTT, GEORGE WILLIAMS, SE-GWEN TYLER, HOLLIS BRASHEAR, JOSE PLATA, KATHLEEN LEOS, and RON PRICE, in their official capacities as Trustees of the Board of Education of the Dallas Independent School District,	§	**Judge Barefoot Sanders**
Defendants.	§	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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Dated: May 2, 2001

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TO DISMISS AND BRIEF IN SUPPORT THEREOF

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, plaintiffs Trinidad "Trini" Garza and Pedro "Pete" Vaca file this Memorandum of Law in Opposition to the Motion to Dismiss of defendants Dallas Independent School District ("DISD"), Ken Zornes, Roxan Staff, Lois Parrott, George Williams, Se-Gwen Tyler, Hollis Brashear, Jose Plata, Kathleen Leos, and Ron Price, as follows:

I.

PRELIMINARY STATEMENT

Ten of the eleven defendants in this action have filed a motion to dismiss plaintiffs' Complaint.[1] That motion is erroneously premised on plaintiffs' purported lack of standing and failure to state *any* claim on which this Court can grant relief. Put simply, defendants' motion is without merit.

Plaintiffs reside in racially-gerrymandered DISD Trustee voting districts — the configuration of which has violated the United States Constitution for over seven consecutive years — although the Board has done nothing over that period to bring those districts into compliance with applicable law. To make matters worse, defendants now admit that those districts are overpopulated in comparison to others[2] — thus diluting the voting power of plaintiffs. Try as they may, defendants cannot run from this suit or, more importantly, the serious issues raised by plaintiffs' claims.

Plaintiffs seek appropriately-redrawn DISD Trustee districts, configured to provide near-equal voting power across all such districts, without race as the predominant factor. Stated another

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[1]Curiously, defendant Board of Education of the Dallas Independent School District (the "Board") has neither answered nor otherwise filed an appearance or Rule 12 motion in this action. Thus, the other defendants' motion, even if granted, would not dispose of this action in its entirety.

[2]*See* Defendants' Original Answer at 8, ¶ 57 ("[D]ue to nine years of shifting population patterns, the difference between the least and most populous Trustee Districts exceeds ten per cent (10%).") Indeed, data released by the DISD since the filing of plaintiffs' Complaint reveals that the population of Mr. Garza's District 8 is 22.56% greater than the lowest populated DISD Trustee district. The population of Mr. Vaca's District 7 is 16.61% greater than the least populous district. Those figures, among other critical statistics, are included in plaintiffs' proposed Amended Complaint, and they demonstrate conclusively the unconstitutional dilution of plaintiffs' voting power.

way, plaintiffs seek recognized forms of relief to redress the injuries they have sustained as a result of defendants' violations of law. Defendants' motion should, therefore, be denied.[3]

II.

SUMMARY OF FACTS

A. Plaintiffs' Well-Pled Factual Allegations.

The facts underlying this action are set forth in plaintiffs' Complaint and Application for Declaratory and Injunctive Relief ("Complaint"), filed on March 28, 2001. For the Court's convenience, those facts are briefly summarized below.

The present configuration of DISD's nine single-member districts violates the United States Constitution and applicable federal and state law.[4] The Board gerrymandered those districts ten years ago based almost exclusively on racial considerations — which, in itself, is unlawful.[5] To exacerbate matters, the demographics of Dallas have changed so substantially over the past decade that the nine DISD districts do not bear any rational relationship to the various communities of interest which make up the social fabric of Dallas.[6] Accordingly, plaintiffs' voting power and the voting power of certain neighborhoods and groups have been diluted with respect to the most important function of local government — the provision of public education.[7]

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[3]To ensure that this Court has all the facts necessary to demonstrate plaintiffs' standing and the viability of their claims, plaintiffs have filed a motion to amend their Complaint. *See* Plaintiffs' Motion for Leave to File First Amended Complaint and Application for Declaratory and Injunctive Relief, filed May 2, 2001.

[4]Complaint at ¶¶ 53-74.

[5]*Id.* at ¶¶ 37-42; 59-61.

[6]*Id.* at ¶¶ 42- 45; 64-66; and 70-71.

[7]*Id.* at ¶¶ 5-13; 20-24; 44-45; 66; and 70-71.

Plaintiffs seek, among other forms of relief, a declaratory judgment that the existing DISD Trustee districts are violative of applicable law and Court orders requiring defendants to appropriately reconfigure those districts in accordance with constitutional and statutory standards.[8]

III.

SUMMARY OF RESPONSE

Defendants' Rule 12(b)(1) motion to dismiss plaintiffs' Complaint should be denied in its for two reasons. First, plaintiffs have standing to bring all of their claims, which include: vote dilution pursuant to the principle of "one-man, one-vote"; discriminatory vote dilution under Section 2 of the Voting Rights Act;[9] unconstitutional gerrymandering; and intentional discrimination. Second, plaintiffs' claims are ripe.

Similarly, defendants' Rule 12(b)(6) motion should be denied for at least four reasons. First, plaintiffs have properly stated a claim for "one-man, one-vote" dilution. Second, plaintiffs have properly stated a claim for a Section 2 discriminatory vote dilution. Third, plaintiffs have properly stated a claim for unconstitutional gerrymandering. Finally, plaintiffs have properly stated a claim for intentional discrimination.

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[8] *Id.* at ¶¶ 62, 67, and 74.

[9] 42 U.S.C. § 1973 (2001).

IV.

ARGUMENTS AND AUTHORITIES

A. This Court Has Subject Matter Jurisdiction And Should, Therefore, Deny Defendants' Rule 12(b)(1) Motion To Dismiss.

1. The legal standards applicable to a Rule 12(b)(1) motion to dismiss.

The standards for ruling on a motion to dismiss for lack of subject matter jurisdiction are well-established in this circuit. The allegations in the complaint are accepted as true,[10] and must be construed "broadly and liberally."[11] Rule 12(b)(1) motions should be granted only "if it appears that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief."[12] To overcome a Rule 12(b)(1) motion to dismiss, a pleader need merely show that it has alleged a claim and that the claim is not frivolous.[13]

2. This Court has subject matter jurisdiction under Rule 12(b)(1), because plaintiffs have standing to bring their claims.

In order to present an Article III "case or controversy," a plaintiff must meet the three-part standing test to invoke federal jurisdiction:[14] (1) the party must establish an "injury-in-fact" to a legally protected interest; (2) there must be "causation" between the injury suffered and the conduct

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[10] *See Meason v. Bank of Miami,* 652 F.2d 542, 544 (5th Cir. 1981) ("For purposes of a motion to dismiss the allegations of the complaint must be accepted as true.").

[11] *See Cloud v. United States,* 126 F. Supp. 2d 1012, 1018 (S.D. Tex. 2000).

[12] *See id.* at 1018.

[13] *See Baker v. Carr,* 369 U.S. 186, 199 (1962) ("Dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were so attenuated and unsubstantial as to be absolutely devoid of merit, or 'frivolous.'") (citations omitted).

[14] *See The Parents, Alumni, and Friends of Taylor Sch. v. City of Norfolk,* 37 F. Supp. 435, 439 (E.D. Va. 1999) ("[T]he Supreme Court set forth a succinct three part test that a party attempting to invoke federal jurisdiction must establish for constitutional standing.").

complained of; and (3) if the court enters a decision in favor of plaintiff, the decision must "redress" plaintiff's claims.[15] Plaintiffs meet that three-part test with respect to each of their four claims.

a. Plaintiffs have standing to bring "one-man, one-vote" dilution claims under the Fourteenth Amendment Equal Protection clause and racially discriminatory vote dilution claims under Section 2 of the Voting Rights Act.

Defendants lump both "one-man, one-vote" dilution and Section 2 racially-discriminatory vote dilution together in its allegation that plaintiffs lack standing for vote dilution.[16] Contrary to defendants' unsupported assertion that plaintiffs are not injured and lack standing,[17] "one-man, one-vote" dilution claims may be brought by any person residing in an overpopulated district.[18] Furthermore, vote dilution claims under Section 2 of the Voting Rights Act are based on a discriminatory dilution effect which disproportionately affects Hispanics. Like "one-man, one-vote" dilution claims, Section 2 vote dilution claims merely require that plaintiffs reside in overpopulated districts to have standing—because anyone in an overpopulated district is inherently injured.[19] More specifically, voters in overpopulated districts are injured-in-fact because their individual voting power is diluted.[20]

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[15] *Id.*

[16] Defendants' Motion to Dismiss, April 11, 2001 ("Defendants' Motion"), at 5.

[17] Defendants' Motion at 7.

[18] *See Fairley v. Forrest Cnty.*, 814 F. Supp. 1327, 1329 (S.D. Miss. 1993) ("[T]he Fifth Circuit held that injury in one-man, one-vote actions 'results only to those persons domiciled in the under represented voting districts.'") (citing *Fairley v. Patterson*, 493 F.2d 598, 603 (5th Cir. 1974)).

[19] Complaint at ¶¶ 16-17; *see Dillard v. Baldwin Cnty. Comm.*, 225 F.3d 1271, 1279-80 (11th Cir. 2000) ("[O]ne who resides in the area directly affected by the allegedly illegal voting scheme has standing to challenge that scheme.").

[20] *See Kaplan v. County of Sullivan,* 74 F.3d 398, 400 (2d Cir. 1996) ("Specifically, to have standing to bring a vote dilution claim, Kaplan must allege that his vote has been rendered less

It is now an *undisputed* fact that plaintiffs Garza and Vaca reside in overpopulated districts, which fact establishes injury-in-fact[21] caused by the DISD's use of unequally populated districts. Thus, the first and second prongs of the standing test are satisfied. The third element is satisfied by the fact that this Court may provide plaintiffs relief by forcing defendants to equalize the district populations, fulfilling the third standing prong. Thus, plaintiffs have standing to bring both types of vote dilution claims.[22]

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effective than if prisoners were included in the voting base.").

[21]Complaint at ¶¶ 1, 2, 44, 45, 51, and 63-67.

[22]Defendants also make the peculiar assertion that plaintiffs lack standing because Hispanics have a majority in the two districts in which they live. (Defendants' Motion at 7). Not only is that argument lacking support in the case law, but it is illegal as well.This argument also fails to address the specifics of plaintiffs' claims, specifically vote dilution, gerrymandering, and intentional discrimination.

b. Plaintiffs have standing to bring a claim for gerrymandering in violation of the Fourteenth Amendment Equal Protection clause.

Defendants correctly acknowledge the established principle that standing for gerrymandering claims simply requires that the plaintiff reside in a district alleged to be gerrymandered.[23] Plaintiffs Garza and Vaca reside in districts that are bizarre in shape and drawn with predominant consideration given to race.[24] Plaintiffs have been "injured-in-fact" by enduring district lines drawn around their homes on the basis of race without any adequate justification. Thus, the "injury-in-fact" and "causation" prongs of the standing test are met.

Despite defendants' unexplained assertion that redressibility is impossible,[25] this Court may "redress" plaintiffs' injury by both forcing defendants to redraw district lines before they are used in an election or considered in the current redistricting process. Thus, plaintiffs meet all three criteria to establish standing to bring their gerrymandering claim.[26]

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[23]*See Bush v. Vera,* 517 U.S. 952, 957 (1996) ("'Where a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action.'") (citation omitted).

[24]Complaint at ¶¶ 1, 2, 37-42, and 59. However, in their motion, defendants subjectively conclude that: "District 7 (of which plaintiff Garza is a resident) cannot by any stretch of the imagination be characterized as 'bizarrely shaped.'" *See* Defendants' Motion at 6. Plaintiffs have two responses to that argument as it concerns the viability of their *Shaw* claims. First, District 7 *is* gerrymandered; indeed, predominantly African-American District 5 has a number of finger-like extensions that invade what appear to be the natural boundaries of District 7 — undoubtedly drawn with the intention of ensuring a particular racial and/or ethnic composition between the two. Second, defendants do not apparently dispute the fact that District 8 (wherein plaintiff Vaca resides) is a bizarrely-shaped, racially-gerrymandered district. In sum, plaintiffs' *Shaw* claims should not be dismissed.

[25]Defendants' Motion at 6.

[26]Defendants' laches argument fails: (1) because laches is an affirmative defense which should not be brought through the vehicle of a Rule 12 motion; and (2) because defendants suffer no "undue prejudice" as a result of plaintiffs' alleged delay in bringing their claim, failing the third

c. **Plaintiffs have standing to bring a claim for intentional discrimination in violation of the Fourteenth and Fifteenth Amendments.**

Although defendants make no argument specifically addressing plaintiffs' claim of intentional discrimination, plaintiffs clearly have standing in connection therewith. Plaintiffs are Hispanics who will personally suffer an intentionally inflicted harm by DISD's use of 1991 districts in the May 5, 2001, election because Hispanics will disproportionately suffer vote dilution.[27] This Court may "redress" this injury-in-fact by preventing defendants from using the current district lines in upcoming elections or as a baseline for the impending redistricting process. Put simply, plaintiffs have standing to bring their claim for intentional discrimination in violation of the Fourteenth and Fifteenth Amendments.

3. **Plaintiffs' claims are ripe.**

Defendants' argument that plaintiffs' claims should be dismissed[28] is based upon the incorrect contention that this case is not ripe because the Board has not had a chance to redistrict based on the 2000 Census.[29] Ripeness is a facet of the Article III "case or controversy"

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prong of the laches test.

[27]Complaint at ¶¶ 17-18.

[28]Defendants' Motion at 5.

[29]*See, e.g., Bonilla v. The City Council of the City of Chicago,* 809 F. Supp. 590 (N.D. Ill. 1992) (denying motion to dismiss for failure to state a claim under § 2 of the Voting Rights Act and intentional discrimination under the Fourteenth and Fifteenth amendments); *Marylanders for Fair Representation, Inc. v. Schaefer,* 795 F. Supp. 747 (D. Md. 1992) (denying motion to dismiss where redistricting process was ongoing); *Knox v. Milwaukee Cnty. Bd. of Election Commissioners,* 607 F. Supp. 1112 (E.D. Wis. 1985) (denying motion to dismiss based on laches and Section 2 of the Voting Rights Act); *Scaringe v. Marino,* 1992 U.S. Dist. LEXIS 8660 (N.D.N.Y. 1992) (denying motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) in redistricting case where redistricting plan not yet complete).

requirement.[30] The purpose of the ripeness inquiry is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements.[31] Here, plaintiffs' claims for relief are neither premature nor abstract.

a. The race-based gerrymandering claims.

It is the height of irony that, at the same time defendants assert lack of ripeness, they also allege that plaintiffs' claims "are barred by the doctrine of laches" and "by the doctrine of estoppel."[32] Indeed, defendants allege that, "Plaintiffs have been on notice since at least 1993, when *Shaw v. Reno* was decided, of any possible *Shaw*-based claim."[33] Those two positions are simply irreconcilable.

But, defendants are correct in one important respect — namely, to the extent that the DISD Trustee districts are racially-gerrymandered (and they are), defendants have had at least seven years to correct and eliminate that constitutional infirmity. Yet, since the Supreme Court's opinion in

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[30] *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81 (1978).

[31] *Thomas v. Union Carbide Agricultural Prods.*, 473 U.S. 568, 580 (1985).

[32] *See* Defendants' Answer at 10.

[33] *See* Defendants' Motion at 3-4.

Shaw, defendants have done nothing to reconfigure the DISD's gerrymandered districts.[34] Accordingly, any challenge to those gerrymandered districts is, by definition, "ripe."[35]

However, defendants erroneously argue that plaintiffs' *Shaw* claims are not ripe, because the DISD has not had a reasonable opportunity to complete redistricting.[36] On the contrary, in light of the fact that the redistricting process has already begun, this Court should take immediate action to declare the 1991 gerrymandered districts unconstitutional and prevent their consideration in the process currently underway.[37]

In arguing that plaintiffs' claims are not ripe, defendants assume that the constitutionality of the 1991 district lines is irrelevant — an assumption which was unambiguously rejected by the

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[34]*See Williams v. The Ledbetter Neighborhood Assoc.*, 734 F. Supp. 1317, n. 366 (N.D. Tex. 1990) (Buchmeyer, J.) ("But most of this 10-15 year delay has already happened, so why do African-Americans and Hispanics have to push so against the 8-3 system? Why can't they just wait for another 1-2 years, and give the 10-4-1 a chance? If asked, perhaps they would reply with an answer similar to the one Dr. Martin Luther King gave from the Birmingham jail: . . . '[W]hen you are forever fighting a degenerating sense of "nobodyness;" then you will understand why we find it difficult to wait.'").

[35]In fact, in a footnote in their motion, defendants concede as much by asserting: "Plaintiffs have been on notice since the Supreme Court's opinion in that case in 1993 that they might have claims as addressed in *Shaw*. The ripeness of those claims is not dependent upon the 2000 Census data becoming available." *See* Defendants' Motion at 7, n.5.

[36]*See* Defendants' Motion at 7.

[37]*See Del Valle Ind. Sch. Dist. v. Lopez,* 863 S.W.2d 507, 511 (Tex. App. - Austin 1993, writ denied) ("Although Del Valle eventually abandoned the at-large system, Appellees had no guarantee that Del Valle would not reimplement its at-large election scheme in the future. Without a declaration by the court or an admission by Del Valle that the at-large system was unconstitutional, Del Valle was free to return to the at-large system. Therefore, because Del Valle refused to admit that the at-large system was unconstitutional, a declaration by the court that the system was unconstitutional was essential . . . . Accordingly, we conclude that the Appellees had a valid cause of action under the UDJA which was not moot . . . .").

United States Supreme Court.[38] When the DISD completes its redistricting plan for 2001, it is required under Section 5 of the Voting Rights Act[39] to submit its plan for preclearance to the Department of Justice or, alternatively, to the D.C. District Court.[40] The preclearance process applies the "retrogression" test, which will compare the to-be-drawn 2001 district lines to the existing 1991 district lines. Preclearance determines whether or not the minority group in question, which suffered vote dilution under Section 2 in the 1991 district arrangement, will be helped or harmed by the 2001 district lines.[41]

However, if the 1991 districts were unconstitutionally gerrymandered, the foregoing process of comparison will be fatally flawed.[42] As a result, plaintiffs' claims are ripe to determine whether the extant 1991 district lines were unconstitutionally gerrymandered and should be barred from consideration in the Section 5 preclearance analysis.

In any event, there is no reason to defer to the Board with respect to the racially-gerrymandered districts, because there is no reason to believe that the Board will act appropriately

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[38]*See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 327-28 (2000) ("Before proceeding to the merits, we must dispose of a challenge to our jurisdiction. The Board contends that these cases are not moot, since its 1992 plan 'will never again be used for any purpose.' . . . The next scheduled election will not occur until 2002, by which time . . . the Board will . . . have a new apportionment plan in place. . . . [I]n at least one respect the 1992 plan will have probably continuing effect: Absent a successful subsequent challenge under § 2, it . . . will serve as the baseline against which appellee's next voting plan will be evaluated for the purposes of preclearance. Whether . . . that future plan represents a change from the baseline, and, if so, whether it is retrogressive in effect, will depend on whether preclearance of the 1992 plan was proper.").

[39]42 U.S.C. § 1973c.

[40]*Id.*

[41]*Id.*

[42]*Id.*

this year, when it has failed to do so for the past seven — especially given defendants' denial of any gerrymandering, let alone any race-based gerrymandering.

b. The population-based voting dilution and intentional discrimination claims.

It is clear from the foregoing that defendants' "ripeness" argument does not extend to the entirety of plaintiffs' claims but, rather, is limited to the voting dilution and intentional discrimination claims relating to the significant population disparities between and among the DISD Trustee districts. However, even as to those claims, defendants' argument fails.

Obviously, the gross disparities among the nine DISD districts arose at some point following the issuance of the 1990 Census data. Of course, it is not plaintiffs' burden to prove the age of defendants' constitutional violations but, rather, merely the existence thereof. However, as is obvious from the Board's longstanding lack of action with respect to the racially-gerrymandered districts (discussed in the immediately preceding sub-section), there is *compelling* reason for this Court to retain jurisdiction over *all* of plaintiffs' claims — not only those relating to race-based gerrymandering and discrimination, but also to those relating to population-based voting dilution.

In the unlikely event that this Court chooses to defer resolution of those claims pending Board consideration of the 2000 Census data, it should nevertheless retain jurisdiction in order to impose appropriate deadlines upon defendants and review defendants' compliance with applicable law in connection with any new districting scheme.[43] A federal court may set a deadline by which

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[43]*See Cosner v. Dalton,* 552 F. Supp. 350, 364 (E.D. Va. 1981) ("[W]e believe that [the Legislature] can constitutionally reapportion the State in the period of five months ending February 1, 1982. If this is not done, we will be compelled to consider drafting a court plan. We retain jurisdiction for this purpose.").

the authorities must adopt a new redistricting plan based on current Census data.[44] That deadline is often crucial to ensuring that federal claims brought in federal court are resolved in time for a valid redistricting plan to be in place before candidates must file to run in the next elections.[45] Once the federal court sets its deadline, it must "stay its hand," retain jurisdiction in order to enforce the deadline, and allow the redistricting processes to run their course unimpeded.[46] Even when federal courts allow legislative bodies time to redistrict, jurisdiction is maintained in case the legislative body fails to redistrict in time, at which point the federal court could impose its own scheme.[47]

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[44]*See Growe v. Emison*, 507 U.S. 25, 36-37 (1993) ("It would have been appropriate for the District Court to establish a deadline by which, if the Special Redistricting Panel had not acted, the federal court would proceed. . . . Of course the District Court would have been justified in adopting its own plan if it had been apparent that the state court, through no fault of the District Court itself, would not develop a redistricting plan in time for the primaries. *Germano* requires deferral not abstention."); *see also Scott v. Germano,* 381 U.S. 407, 409 (1965) ("This case is remanded with directions that the District Court enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois . . . may validly redistrict . . . .").

[45]*See Scaringe v. Marino,* 1992 U.S. Dist. LEXIS 8660, *7-*8 (N.D.N.Y. 1992) ("The election process, including the primaries scheduled for September, must be delayed while the new plans await preclearance, and may indeed be delayed to such a degree that the general elections cannot feasibly take place in November as scheduled. Thus, it appears that intervention by this court is necessary to ensure that the redistricting of the State of New York takes place in time for the Senate and Assembly elections to be held as scheduled in November of 1992.").

[46] *See Growe,* 507 U.S. at 34-36 ("It would have been appropriate for the District Court to establish a deadline by which, if the Special Redistricting Panel had not acted, the federal court would proceed. But the . . . deadline that the District Court established here was explicitly directed *solely at the legislature.* The state court was never given a time by which it should decide on reapportionment, legislative *or* congressional, if it wished to avoid federal intervention.") (italics in original).

[47]*See Scott v. Germano,* 381 U.S. 407, 409-10 (1965) ("The District Court shall retain jurisdiction of the case and in the event a valid reapportionment plan for the State Senate is not timely adopted it may enter such orders as it deems appropriate, including an order for a valid reapportionment plan for the State Senate . . . .").

By contrast, defendants' request that this Court dismiss the case as unripe contravenes the well-established rule that federal courts should not dismiss on account of ongoing redistricting proceedings, but should set a deadline for the authorities to comply with applicable law.[48] This Court should also retain jurisdiction for the purpose of instructing the DISD redistricting decision-makers regarding the appropriate redistricting criteria.[49] Defendants' argument that redistricting has already begun is unpersuasive, because defendants continue to demonstrate an unwillingness to comply with appropriate redistricting criteria.[50] In short, plaintiffs' claims are ripe for adjudication. Accordingly, this Court should deny defendants' motion, retain jurisdiction, and address and resolve those claims on the merits.

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[48]In *Growe,* state and federal redistricting suits were filed in early 1991 – well before the Minnesota legislature had time to redistrict based on new Census data. The Supreme Court held that the federal district court was not required to dismiss the case (as defendants ask this Court to do here). The Court required the district court to "stay its hand" and defer to the state proceedings. The Court explained that it was appropriate for the federal district court to set a deadline for the state authorities and then to stay the case to allow the state processes to run their course.

[49]*See Williams v. The Ledbetter Neighborhood Assoc.,* 734 F. Supp. 1317, 1409, 1411 (N.D. Tex. 1990) (Buchmeyer, J.) ("This Court is precluded from ruling on the validity of the 10-4-1 plan until it has received 'preclearance' under § 5 of the Voting Rights Act. . . . However, the evidence presented at trial does permit this Court to make a few preliminary observations concerning the 10-4-1 plan. . . . [I]n view of these 'preliminary observations,' there would be nothing to prevent the Dallas City Council from addressing this problem again -- before this Court is forced to do so following the preclearance battle over the 10-4-1 plan.").

[50]Defendants mistakenly rely on *Reynolds v. Sims,* 377 U.S. 533 (1964), and *Chisom v. Romer,* 853 F.2d 1186 (5th Cir. 1988), to argue that this Court lacks subject matter jurisdiction. Both *Reynolds* and *Chisom* examine whether to stay an election and hold that staying an election is a discretionary decision of district courts. Neither case discusses subject matter jurisdiction where plaintiffs request other forms of relief in addition to stay of an election.

B. DISD's Motion To Dismiss For Failure To State A Claim Should Be Denied Because Plaintiffs Have Adequately Plead All Claims.

1. The legal standards applicable to a Rule 12(b)(6) motion to dismiss.

A motion to dismiss for failure to state a claim upon which relief can be granted tests the formal sufficiency of the statement of a claim for relief in the complaint[51] and is not appropriate unless the face of the plaintiff's pleadings show, beyond doubt, that plaintiff cannot prove any set of facts that would entitle it to relief.[52] Such motions are disfavored and are generally overcome by the liberal pleading policies of the Federal Rules of Civil Procedure.[53] The Court must assume all material facts contained in the complaint are true and indulge all inferences in favor of the plaintiffs.[54]

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[51] *See Doe v. Hillsboro ISD,* 81 F.3d 1395, 1401 (5th Cir. 1996).

[52] *See Garrett v. Commonwealth Mtg. Co.,* 938 F.2d 591, 594 (5th Cir. 1991).

[53] *See Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.,* 677 F.2d 1045, 1050 (5th Cir. 1982) ("[T]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.'") (citations omitted).

[54] *See Doe,* 81 F.3d at 1401.

2. Plaintiffs have stated a claim for vote dilution in violation of the Fourteenth Amendment Equal Protection Clause based on the population discrepancies among districts of greater than ten percent.

To state a claim for vote dilution contravening the Equal Protection Clause, plaintiffs need only allege that the population difference between the largest and smallest districts is greater than ten percent.[55] Plaintiffs' Complaint clearly meets that burden here, because plaintiffs allege that the difference between the least and most populous DISD voting districts is over 10 percent.[56] Plaintiffs further state that the deviation is not based upon legitimate consideration of a rational state policy.[57] Thus, plaintiffs meet their burden of adequately pleading vote dilution.[58]

3. Plaintiffs have stated a claim for discriminatory vote dilution in violation of Section 2 of the Voting Rights Act of 1965.

Under the stringent standard for dismissal of Section 2 Voting Rights Act claims, dismissal is appropriate only if the allegations in the complaint, and all reasonably inferences drawn therefrom,

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[55]*See Connor v. Finch,* 431 U.S. 407, 416-17 (1977) (holding that districts with a maximum deviation from equal population of 16.5% violate the one-person, one-vote mandate in the absence of compelling justification for the deviation); *see also Hadley v. Junior College Dist. of Metrop. Kansas City,* 397 U.S. 50, 57 (1970) (holding that the district court erred in dismissing a vote dilution claim against local junior college where one district with approximately 60 percent of the total population elected only 50 percent of the trustees); *see also Sims v. Amos,* 365 F. Supp. 215, 222 (M.D. Ala. 1973) (stating that a maximum deviation of less than 10 percent between the largest and smallest districts is permissible and need not be justified by the state; however, a deviation of greater than 16.4 percent is intolerable under the equal protection clause).

[56]Complaint at ¶ 57.

[57]*Id.*

[58]*Compare Sims v. Amos,* 365 F. Supp. 215, 222 (M.D. Ala. 1973) (stating that a maximum deviation of less than 10 percent between the largest and smallest districts is permissible and need not be justified by the state; however, a deviation of greater than 16.4 percent is intolerable under the equal protection clause); *with* Complaint at ¶¶ 56-58.

could not satisfy the *Gingles* criteria.[59] The *Gingles* threshold criteria consists of the following three requirements: (1) that the minority group is sufficiently large and geographically compact to make up a majority in a properly drawn district; (2) that it is politically cohesive; and (3) that majority bloc voting typically frustrates the election of the minority group's preferred candidate.[60] Additionally, plaintiffs must allege facts demonstrating a diminished right to participate in the political process as a minority group. Plaintiffs' Complaint meets this burden.[61]

a. Plaintiffs adequately allege sufficient size and geographic compactness under *Gingles* prong one.

The first *Gingles* criterion is sufficient size and geographical compactness to make up a majority in a properly drawn district. In satisfaction of this requirement, plaintiffs allege that Hispanics in Dallas are a sufficiently large and geographically-compact group to constitute a majority in more than just the current two districts with a Hispanic majority.[62] Plaintiffs also allege that the Hispanic population has exploded, and plaintiffs support this allegation with abundant

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[59]*See Bonilla v. The City Council of the City of Chicago,* 809 F. Supp. 590, 595 (N.D. Ill. 1992) ("[D]ismissal will only be appropriate if the allegations in the complaint, and all reasonable inferences drawn therefrom, could not satisfy the *Gingles* criteria. Under this liberal standard, the court finds that the Bonilla Plaintiffs' *Gingles* allegations are sufficient to withstand a motion to dismiss.").

[60]*See Thornburg v. Gingles,* 478 U.S. 30, 35 (1986); *see also Bonilla,* 809 F. Supp. at 594 (denying motion to dismiss where pleader alleged facts sufficient to meet the three-fold *Gingles* test and also alleged that the Hispanic minority did not enjoy an undiminished right to participate in the political process).

[61]Complaint at ¶¶ 53-67. Defendants argue at length that vote dilution claims should be brought under the Fourteenth Amendment. That premise is undisputed and irrelevant. (Defendants' Motion at 9).

[62]Complaint at ¶ 66.

statistical data.[63] These assertions are sufficient to survive a motion to dismiss for failure to state a claim under the first *Gingles* prong.[64]

b. Plaintiffs adequately allege political cohesiveness under *Gingles* prong two.

The second *Gingles* criterion is political cohesiveness. In satisfaction of this element, plaintiffs allege that the Hispanic minority in Dallas is politically cohesive.[65] Plaintiffs further explain that the majority of population growth has occurred in Hispanic neighborhoods as a result of cohesion.[66] These assertions imply Hispanic political cohesiveness and satisfy the second *Gingles* criterion.[67]

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[63]*Id.* at ¶ 44.

[64]*Compare Bonilla,* 809 F. Supp. at 595 ("In satisfaction of this requirement, the Bonilla Plaintiffs allege that while the March 1992 map establishes seven majority Hispanic wards, the Hispanic population is sufficiently large and geographically compact to constitute the majority in one or two additional wards. Moreover, the Bonilla Plaintiffs also allege that Hispanics presently constitute approximately 19.6% of the total population in Chicago . . . ."); *with* Complaint at ¶ 44 ("The Hispanic population in Dallas has exploded. The 2000 Census reported that Dallas's population of 1,188,580 is now 35.6% Hispanic. According to the 1990 Census, Dallas's population of 1,006,877 was 20.9% Hispanic. Indeed, the 212,000-person increase in the Hispanic community accounts for most, if not all, of Dallas's growth over the past decade. Today, more than one of every three people in Dallas is Hispanic, as compared to one in every five just ten years ago."); *and* Complaint at ¶ 66 ("Hispanics in Dallas are a sufficiently large and geographically-compact group to constitute a majority in more than just the current two districts with a Hispanic majority . . . ."); *and* Complaint at ¶ 44 ("Indeed, the variation between the least populous and most populous districts within the DISD is well over 10%, and that ever-growing disparity is attributable, in large part, to the rising population of Hispanics in Dallas.").

[65]Complaint at ¶ 66.

[66]*Id.* at ¶ 45.

[67]*Compare Bonilla,* 809 F. Supp. at 595 ("In satisfaction of this requirement, the Bonilla Plaintiffs allege that 'Hispanic electoral candidates' and 'the political aspirations of the Latino community' have been damaged by racially polarized voting the past. The Bonilla Plaintiffs also allege that the March 1992 map denies 'Hispanic voters the ability to influence the outcome of City Council aldermanic elections.'") (citations omitted); *with* Complaint at ¶ 45 ("The Hispanic community remains, in many ways, a closely-knit group. The growing Dallas Hispanic community

c. Plaintiffs adequately allege minority bloc voting under *Gingles* prong three.

The final *Gingles* criterion is an allegation of majority bloc voting which typically frustrates the minority group's preferred candidate. In satisfaction of this part of the test, plaintiffs allege that current voting district lines enable White (Non-Hispanic) candidates to defeat Hispanic candidates because Hispanic votes are under-weighed as a result of overpopulated Hispanic-majority districts.[68] Plaintiffs also allege that although Hispanics make up a large percentage of the DISD electorate, Hispanics occupy and have occupied a disproportionately low number of DISD Board seats.[69] Plaintiffs point to the history of official discrimination against Hispanics and the effect this has on the Hispanic community's ability to participate in the Democratic process.[70] The Complaint also discusses the history of segregation that has adversely affected Hispanic schoolchildren, who still suffer from inadequate bilingual education in spite of a federal court order mandating such education.[71]

Based upon the foregoing, and all reasonable inferences drawn therefrom, plaintiffs have adequately alleged facts in support of the final *Gingles* prong.[72] Defendants' naked assertion that

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tends to make its home in neighborhoods where a shared ethnic background is among the 'ties that bind.' As a result, certain areas of the City have grown more rapidly than others. It is in those areas where Hispanic voting power has been diluted."); *and* Complaint at ¶ 66 ("[T]he Hispanic minority is politically cohesive.").

[68]Complaint at ¶ 66.

[69]*Id.*

[70]*Id.*

[71]Complaint at ¶¶ 20-24.

[72]*Compare Bonilla,* 809 F. Supp. at 595 ("[T]he Bonilla Plaintiffs allege that racially polarized voting has historically penalized Hispanic electoral candidates. They also allege that while Hispanics presently constitute approximately 20% of the total population in Chicago, only four of

prong three is inadequately alleged because Hispanics have been elected in the past is flatly contradicted by the United States Supreme Court.[73]

d. Allegations presently before the Court do not show that Hispanics have an undiminished right to participate in the political process.

In addition to satisfying the *Gingles* threshold criteria, plaintiffs demonstrate that the Hispanic minority has not had an undiminished right to participate in the political process.[74] Plaintiffs definitively allege that Hispanics do not have an unlimited ability to participate in the electoral process. Not only do Hispanics have disproportionate representation on the Board,[75] but the current district lines mathematically dilute the Hispanic vote because the majority of the Dallas population increase has been in the Hispanic community.[76] These allegations state a legitimate claim

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the fifty aldermanic seats (8%) are currently held by Hispanics. Additionally, the Bonilla Plaintiffs point out that Hispanic Chicagoans were found to have been discriminated against after the 1980 Census. Based upon the foregoing, and all reasonable inferences drawn therefrom, the court finds that the Second Amended Complaint adequately alleges racial bloc voting."); *with* Complaint at ¶ 66 ("[C]urrent voting district lines enable Anglo candidates to defeat Hispanic candidates because Hispanic votes are being under-represented as a result of overpopulated Hispanic-majority districts; (4) based on the totality of the circumstances, the current districting scheme decreases the opportunity of Hispanics to participate in the political process and to elect representatives of their choice; (5) although Hispanics make up a large percentage of the DISD electorate and student body, Hispanics occupy and have occupied a disproportionately low number of DISD Board seats; and (6) the history of official discrimination affecting the Hispanic community's participation in the DISD democratic process is profound."); *and* Complaint at ¶¶ 20-24.

[73]Defendants' Motion at 8; *see Bush v. Vera,* 517 U.S. 952, 983 (1996) (stating that "[n]onretrogression . . . mandates that the minority's *opportunity* to elect representatives of its choice not be diminished[.]").

[74]*See Baird v. Consolidated City of Indianapolis,* 976 F.2d 357, 359 (7th Cir. 1992) ("Proof [of the *Gingles* factors] . . . is not enough . . . if other considerations show that the minority has an undiminished right to participate in the political process.").

[75]Complaint at ¶¶ 5-13.

[76]*Id.* at ¶¶ 44, 45, 70, and 71.

for vote dilution under Section 2 because the facts presented by the plaintiffs' Complaint show that Hispanics' participation in the DISD electoral process has been diminished.[77]

4. Plaintiffs have stated a claim for gerrymandering in violation of the Fourteenth Amendment Equal Protection Clause.

In order to state a claim under the Equal Protection Clause for racial gerrymandering, plaintiffs must allege that districts are drawn in such an extremely irregular fashion as to be unexplainable, other than being based solely on race.[78]

Plaintiffs have more than adequately plead that the 1991 districts were gerrymandered in violation of the Equal Protection Clause. Plaintiffs allege that the DISD voting districts are bizarrely shaped, are not compact and contiguous, and were configured without regard for traditional districting principles.[79] Plaintiffs allege that the districts are so irregular on their face that they

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[77]*See Bonilla,* 809 F. Supp. at 595-96 ("Hispanic Chicagoans are not proportionately represented under the March 1992 map. Furthermore, because this is a motion to dismiss, the scope of the court's analysis is limited to the complaint and any facts alleged by the Bonilla Plaintiffs in support of the complaint. Thus, regardless of what Defendants may eventually be able to prove under a 'totality of the circumstances' argument (e.g., whether or not this is merely an inappropriate vote maximization request), the allegations presently before the court do not show that Hispanics have an 'undiminished right to participate in the political process.' These allegations do, however state a legitimate fracturing claim under § 2 of the Voting Rights Act.").

[78]*See Shaw v. Reno,* 509 U. S. 630, 649 (1993) ("[W]e conclude that a plaintiff challenging a reapportionment statute under the Equal Protection Claud may state a claim by alleging that the legislation, though race-neutral on its fact, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."); *see also DeWitt v. Wilson,* 856 F. Supp. 1409, 1412 - 13 (E.D. Cali. 1994) ("Shaw held when districts are drawn in such an extremely irregular fashion as to be unexplainable, other than being based solely on race, a claim under the Equal Protection Clause for racial gerrymandering can be stated. . . . The Court in Shaw specifically noted that 'we express no view as to whether the intentional creation of majority-minority districts, without more, always gives rise to an equal protection claim. We hold only that on the facts of this case, plaintiffs have stated a claim sufficient to defeat the state appellees' motion to dismiss.'") (citing *Shaw,* 509 U.S. at 530).

[79]Complaint at ¶ 59.

rationally can be viewed only as an effort to segregate the races for purposes of voting.[80] Plaintiffs conclude that race was the predominant factor in the 1991 redistricting decisions.[81] Plaintiffs bolster these allegations with specific descriptions of the gerrymandered districts.[82] Plaintiffs also allege that there is not justifying state policy for the gerrymandering.[83] These allegations surpass requirements to survive a motion to dismiss.[84]

5. Plaintiffs have stated a claim for intentional discrimination in violation of the Fourteenth and Fifteenth Amendments.

To prevail on a claim based upon either the Fourteenth or Fifteenth Amendments,[85] a plaintiff must allege and prove the existence of discriminatory intent on the part of the defendant.[86] Consequently, to establish that a particular reapportionment plan violates either the Fourteenth or Fifteenth Amendments, a plaintiff must plead and prove that the plan was conceived or operates as a purposeful device to further racial or ethnic discrimination.[87]

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[80]*Id.*

[81]Complaint at ¶¶ 60-61.

[82]*Id.* at ¶¶ 37-42.

[83]Complaint at ¶ 60.

[84]*Compare supra* n. 77, *with* Complaint at ¶¶ 37-42; *and* Complaint at ¶¶ 59-61.

[85]Despite defendants' vague assertions to the contrary, plaintiffs intentional discrimination claims are properly brought under the Fourteenth and Fifteenth amendments. (Defendant's Motion at 9.) (*See Prejean v. Foster,* 227 F.3d 504, 519 (5th Cir. 2000) ("[T]he Fifteenth Amendment 'establishes a national policy . . . not to be discriminated against as voters in elections to determine public governmental policies or to select public officials . . . .'") (citation omitted)).

[86]*See Mobile v. Bolden,* 446 U.S. 55, 62 (1980) ("[R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.").

[87]*See id.* at 62-66.

Plaintiffs specifically allege that, in light of the well-documented, phenomenal growth within the Hispanic community and the disproportionate effect of the current district lines on Hispanics, defendants' failure to reschedule the May 5, 2001, election may only be interpreted as intentional or purposeful discrimination against Dallas Hispanics.[88] This allegation not only notifies defendants of the intentional discrimination claim against them, it also expressly identifies the claim's factual underpinning: intentional, discriminatory dilution by means of the use of 1991 district lines.[89] This allegation is sufficient to withstand a motion to dismiss.[90] Thus, all of plaintiffs' claims have been appropriately stated.

V.

CONCLUSION AND REQUEST FOR RELIEF

For all the foregoing reasons, plaintiffs respectfully request that defendants' motion to dismiss the complaint be denied in all respects. However, in the unlikely event that this Court is inclined to grant the motion to dismiss, plaintiffs request that this Court grant plaintiffs' Motion for Leave to File First Amended Complaint and Application for Declaratory and Injunctive Relief.[91]

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[88]Complaint at ¶¶ 68-72.

[89]Defendants insert a lengthy argument defending a privileges and immunities claim which was never asserted by plaintiffs. (*see* Defendant's Motion at 9-10.)

[90]*Compare Bonilla,* 809 F. Supp. at 600 ("[T]he Bonilla Plaintiffs specifically allege that the March 1992 Map 'intentionally deprives and abridges plaintiffs of the right to vote,' in that 'the defendants' are maintaining and perpetrating an unlawful redistricting map which intentionally and discriminatorily cancels out and dilutes the voting rights of the plaintiffs.' . . . [T]he Bonilla Plaintiffs' allegation of intentional discrimination in violation of the 14th and 15th Amendments is sufficient to withstand a motion to dismiss.") (citation omitted); *with* Complaint at ¶¶ 68-72.

[91]Motion for Leave to File First Amended Complaint and Application for Declaratory and Injunctive Relief, filed May 2, 2001.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause in accordance with Rule 5, Federal Rules of Civil Procedure on this 2 day of May, 20 01

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